NAVIGABLE WATERS OF THE UNITED STATES — STATE AND NATIONAL CONTROL

THE *Des Plaines River Cases*[1] involved two suits to enjoin a riparian owner, on that river, from damming it. The State of Illinois first brought suit in the courts of that State, which decided that the river was not a "navigable stream"; that the riparian owner, a power company, had the right to dam it; and that the suit must, consequently, be dismissed. A writ of error to review this was dismissed by the Supreme Court of the United States as lacking jurisdiction. The United States Government then brought suit in the federal court to enjoin the same structure. This court decided that the stream was "a navigable water of the United States"; that the company had no right to dam it; and that a perpetual injunction should be granted. This decision was affirmed by the Supreme Court of the United States.

The Des Plaines is the north fork of the Illinois River, flowing south from Wisconsin, eleven miles west of Lake Michigan, with which, in a state of nature, it was connected by Portage Lake and the Chicago River. It was the most famous and the most used of the waterways between the Great Lakes and the Mississippi in the Fur Trade period, 1675–1832. The Blackhawk War, in 1832, and the inrush of immigration, drove away the fur-bearing animals and the fur trade. In 1848 the river was displaced by the parallel Illinois and Michigan Canal, now abandoned, which took the water from the river. In 1900 the river was replenished and greatly augmented by the great Chicago Sanitary and Ship Canal, two hundred feet in width and twenty in depth taking water from Lake Michigan and discharging into the Des Plaines.

The decision of the United States Supreme Court that the ancient use of the stream by the methods of primitive navigation established a public right which is not lost by non-user has far-reaching effect. Two modern tendencies were at grips with one

[1] Economy Light & Power Co. *v.* United States, 41 Sup. Ct. Rep. 409 (1921); s. c., 256 Fed. 792 (1919); Illinois *v.* Economy Light & Power Co., 241 Ill. 290, 89 N. E. 76 (1909); s. c., 234 U. S. 497 (1914).

another. A vast new development of water power has resulted from the electric transmission of power. Opposed to this has been a development, almost as rapid, of shallow-craft navigation, aided by barge navigation, the naptha and gasoline launch, and the tunnel boat (U. S. Patent No. 733010, issued July 2, 1902). These inventions make practicable the use of shallow streams to an extent even greater than prevailed before the invention of the steamboat.

The meaning of the decision is that wherever navigation was in fact practised upon any of the headwater tributaries of our great rivers, the public right of navigation inheres, and is protected by the Act of Congress of March 3, 1899, against any unauthorized interruption by the rapidly growing water-power development.

Navigability of waters and title to the lands submerged by them are closely related subjects. This relation causes much confusion in the decisions. In the State Court, about two-thirds of the long opinion handed down in the *Des Plaines River Case* is devoted to title and contracts concerning title; navigability is subordinated in importance and is presently found not to exist. In the federal courts all question of title is excluded from the opinions; navigability alone is dealt with, is found to exist, and is protected by injunction.

In general it may be said that the tendency in the federal courts has been to protect the public right of navigation, while that of the courts of Illinois and of some other states has been to protect the riparian owners in exploiting the water power and other resources of the rivers, and hence to restrict the right of navigation. In the *Des Plaines River Cases* these conflicting tendencies led to a direct conflict of decisions.

Using these cases as illustrations, it is intended to discuss herein some of the principal questions involved.

I. Navigable Waters of the United States — Definitions — Conflicting Standards and Tests of Navigability.

By Act of Congress in 1920[2] it was provided that

"'Navigable waters' means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regu-

[2] 41 Stat. at L., c. 285, p. 1063, § 3 (June 10, 1920) (italics are mine). For the previous judicial definition see The Daniel Ball, 10 Wall. (U. S.) 557 (1870). Itali-

ate commerce with foreign nations and among the several States, and which either in their natural *or improved condition, notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows or rapids compelling land carriage,* are used *or suitable for use* for the transportation of persons or property in interstate or foreign commerce, *including therein all such interrupting falls, shallows, or rapids;* together with such other parts of streams as shall have been *authorized by Congress for improvement by the United States,* or shall have been *recommended to Congress* for such improvement after investigation under its authority."

In the earlier adjudications by the state and federal courts, a great diversity of opinion as to the proper tests for navigability is to be seen. The Illinois court, while vacillating in its expressions upon the subject, has exemplified the tendency to apply the doctrine of *stare decisis* to a determination, for whatever reason, that a given river is navigable or unnavigable. At an early date the tide-water test was adopted, and the Mississippi, Ohio, and other rivers uninfluenced by tides were held to be non-navigable.[3] In a number of cases the tide-water test has been tacitly disregarded but no new

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cized portions of the definition in the 1920 Act, as printed above, are new. They indicate points of difference between the state court and the federal courts in the *Des Plaines* cases. (*a*) The state courts gave controlling influence to interruptions occupying less than two miles of channel; (*b*) they disregarded the ten reports of the United States engineers recommending improvement of the river; and (*c*) they also disregarded two Acts of Congress authorizing surveys for improvement. The federal courts gave controlling influence to the character of the streams as a whole, and decided in harmony with those recommendations and Acts.

[3] (The citations of authorities generally herein are illustrative and not intended to be exhaustive). Middleton *v.* Pritchard, 4 Ill. (3 Scam.) 510 (1842) (Mississippi River); Ensminger *v.* People *ex rel.*, etc., 47 Ill. 384 (1868) (Ohio River); City of Chicago *v.* McGinn, 51 Ill. 266 (1869); Braxon *v.* Bressler, 64 Ill. 488 (1872) (Rock River); Houck *v.* Yates, 82 Ill. 179 (1876) (Mississippi River); Trustees *v.* Schroll, 120 Ill. 509, 12 N. E. 243 (1887) (Meredosia Lake); St. Louis Bridge Co. *v.* East St. Louis, 121 Ill. 238, 12 N. E. 723 (1887) (Mississippi River); Canal Trustees *v.* Haven, 10 Ill. 548 (1849). These cases involved mainly questions of title to the bed and banks.

In the first of the series, Middleton *v.* Pritchard, 4 Ill. (3 Scam.) 510 (1842), the court *arguendo* recognize that the decision relates only to title and imply that the Mississippi is navigable in fact, though not applying that phrase to it. They say (pp. 521, 522): "We would not however wish to be understood as limiting the rights of *navigators,* to the bare privilege of floating upon the water, in the use of the *public easement;* but understand it to include the right to land, and fasten to the shore, as the exigencies of the navigation may require; and this is a burthen upon the owner of land, which he must bear as part of the *public easement,*" citing People *v.* Canal Appraisers, 13 Wend. (N. Y.) 355 (1835), and 3 KENT, COMM. 425.

test formally substituted.[4] And in another series of cases the new test of navigability in fact is expressly laid down.[5]

The conflict between the Illinois standard and the federal standard prior to the statute quoted above is illustrated by Rock River, an interstate stream some two hundred miles long, held navigable by the federal court [6] and, as to the upper and shallower parts, by the Wisconsin court,[7] but held not navigable in law, though conceded to be navigable in fact, by the courts of Illinois.[8] And this, in substance, continued to be the Illinois position even with the federal decision *contra* before the court.[9]

In Texas, the Land Law [10] of 1837 enacted that all streams of the average width of thirty feet shall be considered navigable, within the meaning of the act, so far as they maintain that average width, and the court has recognized the validity of this declaration.[11] In Virginia it is held that the legislature may, by a statute declaring a stream navigable, impose upon the public the burden of caring for it as a highway.[12] And in North Carolina a stream

[4] Illinois River Packet Co. *v.* Peoria Bridge Assn., 38 Ill. 467 (1865) (Illinois River); Chicago & Pacific R. R. Co. *v.* Stein, 75 Ill. 41–45 (1874); City of Chicago *v.* Law, 144 Ill. 569–576, 33 N. E. 855 (1893) (Chicago River in all three). These cases involved the rightfulness or wrongfulness of bridges, and the powers of a city.

[5] People *v.* St. Louis, 10 Ill. (5 Gilm.) 351 (1848) (Mississippi River); Joliet & Chicago R. R. Co. *v.* Healy, 94 Ill. 416 (1880), affirmed in 116 U. S. 191 (1886) (Healy Slough held not a stream); Ligare *v.* Chicago M. & N. R. R. Co., 139 Ill. 46, 28 N. E. 934 (1891); S. C., 166 Ill. 249, 46 N. E. 803 (1897) (Ogden Slip held not a stream); People *v.* Board of Supervisors, 122 Ill. App. 40 (1905) (Rock River treated as though not navigable); Schulte *v.* Warren, 218 Ill. 108, 75 N. E. 783 (1905) judgment below that it is navigable reversed on other grounds (Clear Lake and Mud Lake, arms of Illinois River, held navigable; tide-water test expressly rejected). In Hubbard *v.* Bell, 54 Ill. 110 (1870), there is a *dictum* that there was no right to float logs on a stream not otherwise navigable, rejecting the rafting standard adopted in Maine, Brown *v.* Chadbourne, 31 Me. 9 (1849), and Michigan, Moore *v.* Sanborne, 2 Mich. 519 (1853), which is the federal rule, and the law in many of the states. (That the opinion is a *dictum* is apparent from the record, consisting of a bill calling for answer under oath, a sworn answer, no replication and no proofs. Such a bill should be dismissed without reference to questions of substantive law. 1 DANIELL, CH. PR., 5 ed., *834.)

[6] United States *v.* City of Moline, 82 Fed. 592 (1897).

[7] Cobb *v.* Smith, 16 Wis. 661 (1863); *In re* Horicon Drainage Dist., 136 Wis. 227, 116 N. W. 12 (1908).

[8] Braxon *v.* Bressler, 64 Ill. 488 (1872).

[9] In People *v.* Board of Supervisors, 122 Ill. App. 40 (1905).

[10] § 42 (Hart. Dig., art. 1878).

[11] Horton *v.* Pace, 9 Tex. 81 (1852), cited in 1 FARNHAM, WATER AND WATERCOURSES, § 24.

[12] Harrison *v.* Holland, 3 Gratt. (Va.) 247 (1846).

navigable in fact for a recurring period or season of each year will be adjudged navigable when the legislature has by statute declared it so.[13] On the other hand, it seems that in Indiana the courts resent a legislative declaration of navigability as an interference with judicial functions.[14] And, seemingly for similar reasons, the court of Illinois, in deciding that the Des Plaines River was not navigable, disregarded two statutes passed by the legislature of that state, in 1839 and in 1907, declaring it navigable, and another, passed in 1889, providing for the removal of obstructions from its bed.[15] In these decisions the state courts seem often to overlook the doctrine that a navigable stream is a highway, and that the establishment of highways, by dedication or otherwise, is a legislative function; but they give full weight to the principle that ascertainment of the existence of a highway, by proof of user, is a judicial function. The Federal Court recognizes the legislative nature of the questions in ruling in the last *Des Plaines Case* that abandonment of a stream once used is a matter for Congress.

In addition to the variety of conflicting tests and the disputed question of the power of a legislature to declare navigability there are other points of serious divergence. It is generally held that neither perennial navigability,[16] nor power to travel against the current,[17] nor present use,[18] nor freedom from removable obstructions,[19] nor

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[13] State *v.* Dibble, 49 N. C. (4 Jones L.) 107 (1856); Davis *v.* Jerkins, 50 N. C. (5 Jones L.) 290 (1858).

[14] Martin *v.* Bliss, 5 Blackf. (Ind.) 35 (1838); Depew *v.* Wabash & E. Canal, 5 Ind. 9 (1854); Neaderhouser *v.* State, 28 Ind. 257 (1867); Ross *v.* Faust, 54 Ind. 471 (1876). The following extracts picture the attitude of these courts: "Nature is competent we should imagine, to make a navigable river without the help of the legislature" Martin *v.* Bliss, 5 Blackf. 35 (1838); "and we . . . can determine the fact whether she has succeeded or not, in a given case, with as much accuracy as a deputy surveyor" Ross *v.* Faust, 54 Ind. 471, 476 (1876).

[15] ILL. L. 1839, Feb. 28, p. 208; ILL. L. 1907, Dec. 6, Adj. Sess., p. 32; ILL. L. 1889, May 29, pp. 125, 133.

[16] Cummins *v.* Spruance, 4 Harr. (Del.) 315 (1845).

[17] Sigler *v.* State, 7 Baxt. (Tenn.) 493 (1874); Ten Eyck *v.* Warwick, 75 Hun, 562, 27 N. Y. Supp. 536 (1894); Farmers' Co-operative Mfg. Co. *v.* Albemarle, etc. R. R. Co., 117 N. C. 579, 23 S. E. 43 (1895); Grant *v.* Gordon, cited in L. R. 2 A. C. 872 (1877).

[18] Hickok *v.* Hine, 23 Ohio St. 523 (1872); Jones *v.* Johnson, 6 Tex. Civ. App. 262 (1894).

[19] State Reservation at Niagara Falls, 37 Hun (N. Y.) 537, 547 (1885), aff'd, 102 N. Y. 734, 7 N. E. 916 (1886).

pecuniary profit resulting from the use,[20] is necessary in order to have navigability. No decision holding that any one of these elements is separately essential has been found. And yet opinions are frequent which rely upon the absence of one or more of them in holding a particular stream not navigable. Just how much use or capacity for use must exist, just when the difficulties become sufficient to destroy the fact and the right of navigation, are necessarily questions admitting wide differences of opinion. In view of the public right as well as property rights dependent upon these decisions, and the consequent need for certainty, the desirability of a uniform federal standard is apparent.

Still another difficulty is the question raised by artificial improvements. In the cases we are considering, the State of Illinois maintained that, when a river has been permanently improved by the Federal Government, by a state, or by a municipality, and has been artificially increased in volume, it is to be judged thenceforward by its altered and improved condition. It averred that the Des Plaines River, long before the defendant bought its riparian property, had been so altered and improved, and that in its present condition it was navigable. The defendant demurred, and the state courts denied the State's proposition. In the federal courts, since the stream was found to have been navigable in a state of nature, no decision on the effect of improvements was necessary. But upon principle the State's proposition seems correct. And in many cases it is implied. Mr. Justice Hughes has said of the Ohio River as altered by improvements: [21]

"Its bed may vary and its banks may change but the Federal power remains paramount over the stream. . . . The public right of navigation follows the stream."

In the *Wheeling Bridge Case* [22] the findings were specific that the bridge did not interfere with that navigation which was possible in the natural condition of the river, by sails and oars, but that it did interfere with the steamboat navigation which used the river in its improved condition. And in *United States* v. *Chandler-Dunbar Co.*[23] the court, (dealing with the Sault Ste. Marie), found that

[20] Lamprey *v.* State, 52 Minn. 181, 53 N. W. 1139 (1893); Atty. Gen. *v.* Woods, 108 Mass. 436 (1871).

[21] Philadelphia Co. *v.* Stimson, 223 U. S. 605, 634 (1912).

[22] 13 How. (U. S.) 518 (1851).

[23] 229 U. S. 53, 66 (1912).

"the stretch of water called the falls and rapids of the river is about 3,000 feet long. . . . The fall in the rapids is about 18 feet. This turbulent water, substantially unnavigable without the artificial aid of canals, constitutes both a tremendous obstacle to navigation and an equally great source of water power, if devoted to commercial purposes."

But the stream as a whole is decided to be a navigable water of the United States; and the dams originally authorized by state legislation are held to be subject to control and modification. In this the stream is judged by its improved condition.[24]

In refusing to allow the contention of the State of Illinois on this point, the state court said: [25]

"To hold that the State can by artificial means make a stream navigable which in a state of nature was not navigable, and thereby deprive riparian owners of their property rights in the bed of the stream, is simply to hold that private property may be taken or damaged for public use without compensation."

The reply to this is complete. The State by its agency the Sanitary District of Chicago had altered this stream under a statute providing complete indemnification and remedies to riparian owners,[26] had completed the same January 17, 1900, and had compensated the owners of this tract several years before the present riparian owner bought in (which was October 30, 1906). It was under no obligation to compensate the new owner over again. The new owner took the property in its changed condition and did not acquire the right to the claim for damages done to the former owner.[27] This portion

[24] The same view is also taken by necessary implication as to the Ohio in Gibson *v.* United States, 166 U. S. 269 (1897); as to the Monongahela in Union Bridge Co. *v.* United States, 204 U. S. 364 (1907); Monongahela Bridge Co. *v.* United States, 216 U. S. 177, 193 (1910); and as to the Mississippi in the reach of St. Anthony Falls in St. Anthony Falls Water Power Co. *v.* St. Paul Water Commrs., 168 U. S. 349 (1897), and as to the Chicago River in Escanaba Co. *v.* Chicago, 107 U. S. 678 (1882), and West Chicago St. R. R. Co. *v.* Chicago, 201 U. S. 506, 522 (1906). Upon this question state courts have differed. Illinois *v.* New, 280 Ill. 393, 400, 117 N. E. 597 (1917), denies the proposition. The Wisconsin court affirms it. Mendota Club *v.* Anderson, 101 Wis. 479, 78 N. W. 185 (1899); Smith *v.* Youmans, 96 Wis. 103, 70 N. W. 1115 (1897). Such differences indicate the need of a uniform national standard which shall be determinable on appeal by the Supreme Court of the United States.

[25] 241 Ill. 290, 325, 89 N. E. 760 (1909).

[26] ILL. L. 1889, May 29; 2 STARR & CURTISS, ILL. ANN. STAT., Ch. 42, §§ 16–19.

[27] C. & A. R. R. Co. *v.* Maher, 91 Ill. 312 (1878); Philadelphia Co. *v.* Stimson, 223 U. S. 605, 627 (1912).

of the opinion illustrates the tendency of the state court first to reach a decision in accordance with its general attitude and then to decide all other points in such a way as to make its decision on what it conceives the main point effective.

Coming to the standard which has been adopted in the federal courts, we find that even rafting has been there considered a type of navigation.[28] Several acts of Congress[29] provide for the protection of rafts and require raft-spans in bridges for their safe passage. *A fortiori*, rafting is treated as navigation under the Acts of Congress of 1796 and 1804 which dealt with frontier streams and creeks over which rafting, and fur-trading carried on in batteaux, barges, canoes, and similar craft, were the only known forms of navigation.[30] That the lumbering and rafting standard, as held to in the United States Supreme Court and in the courts of Wisconsin, Michigan, and Minnesota, is also British law, is apparent from the case of *Grant* v. *Gordon*.[31] But the lumbering and rafting

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[28] United States *v.* Bellingham Bay Boom Co., 176 U. S. 211 (1900); Pound *v* Turck, 95 U. S. 459 (1877); United States *v.* Burns, 54 Fed. 351 (1893); United States *v.* Marthinson, 58 Fed. 765 (1893).

[29] Act of March 3, 1873, ch. 278, 17 STAT. AT L. 606; U. S. REV. STAT., § 5254; and of July 5, 1884, ch. 289, § 8, 6 FED. STAT. ANN., 795; and of March 23, 1906, 34 STAT. AT L. 84, ch. 1130, § 4.

[30] Act of May 18, 1796, § 9 (1 STAT. AT L., ch. 29, pp. 464–468); "all navigable rivers within the territory to be disposed of by virtue of this act, shall be deemed to be, and remain public highways."

Streams sustaining rafting and shallow draft boating are held navigable in the authorities noted and many others: Morgan *v.* King, 35 N. Y. 454 (1866); Brown *v.* Chadbourne, 31 Me. 9 (1849); Moore *v.* Sanborne, 2 Mich. 519 (1853); Bucki *v.* Cone, 25 Fla. 1, 6 So. 160 (1889); Goodwill *v.* Bossier Parish Police Jury, 38 La. Ann. 752 (1886) (Mack's Bayou); Thompson *v.* Androscoggin River Imp. Co., 54 N. H. 545 (1874); Boardman *v.* Scott, 102 Ga. 404, 30 S. E. 982 (1897); Hickok *v.* Hine, 23 Ohio St. 523 (1872) (Grand River) (Catawba and Johns Rivers: low water, 8 to 12 inches), Avery, J.; Burke Co. *v.* Catawba Lumber Co., 116 N. C. 731, 21 S. E. 941 (1895) (Tar River), Avery, J.; Farmers' Co-op. Mfg. Co. *v.* Albemarle, etc. R. R. Co., 117 N. C. 579, 23 S. E. 43 (1895); American River Water Co. *v.* Amsden, 6 Cal. 443 (1856) (Creole Creek); Hallock *v.* Suitor, 37 Ore. 9, 6 Pac. 384 (1900); Keator Lumber Co. *v.* St. Croix Boom Corp., 72 Wis. 62, 38 N. W. 529 (1888); Castner *v.* Dr. Franklin, 1 Minn. 73 (1852) (Noluchuky River); Stuart *v.* Clark, 2 Swan. (Tenn.) 9 (1852) (Powell River, Cooper, J.); Holbert *v.* Edens, 5 Lea (Tenn.) 204 (1880); Southern R. R. *v.* Ferguson, 105 Tenn. 552, 59 S. W. 343 (1900); Barclay R. R. & Coal Co. *v.* Ingham, 36 Pa. St. 194 (1860); Atty. Gen. *v.* Woods, 108 Mass. 436 (1871); French *v.* Connecticut River Lumber Co., 145 Mass. 261, 14 N. E. 113 (1887).

[31] Mor. Dic. 12, 822, cited in L. R. 2 A. C. 872 (1877), and 1 FARNHAM, WATERS AND WATERCOURSES, 121.

standard has been expressly rejected in Illinois.[32] And the effects of the tide-water test, which was brushed aside in the federal courts by the *Genesee Chief*,[33] lingers on in Illinois, though the words of the test have there been tacitly abandoned. There is thus a broad chasm between the Illinois standard of navigability and that accepted by the federal courts.

II. State Dominion, Ownership and Control of Waters — Subjects Contrasted with Navigation

The sovereignty and dominion of a state and the obligation of its laws extend over all the waters within its boundaries, subject to modification by paramount laws of the United States.[34] The shores and beds of navigable waters in the original states were not granted to the national government, but were reserved to the states. And upon the admission of new states to the Union the beds of navigable rivers within their boundaries passed to the states, so that they have the same rights, sovereignty, and jurisdiction over the shores and beds as have the original states. The status of this land is determined by the law of each state.[35]

The state has dominion of the water while flowing in the navigable rivers,[36] but holds it in trust for the whole people for their common benefit, through the paramount right of navigation; and, subject thereto, it holds the flow in trust for the riparian owners and other owners who may have acquired special interests in the streams.[37]

Where the state retains title to the bed of the stream, it holds it not as a private proprietor but as sovereign, in trust to protect

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[32] Hubbard *v.* Bell, 54 Ill. 110 (1870).

[33] 12 How. (U. S.) 443 (1851).

[34] People *v.* Welch, 141 N. Y. 266, 36 N. E. 328 (1894).

[35] Pollard *v.* Hagan, 3 How. (U. S.) 212 (1845) (followed ever since); Shively *v.* Bowlby, 152 U. S. 1 (1893); United States *v.* Chandler-Dunbar Co., 209 U. S. 447 (1908). The land, however owned, is subject to the same public trusts and limitations as lands under tide waters on the borders of the sea. Ill. Central R. R. Co. *v.* Illinois, 146 U. S. 387 (1892).

[36] Plumleigh *v.* Dawson, 6 Ill. (1 Gilm.) 544, 550 (1844).

[37] West Chicago St. R. R. Co. *v.* People, 214 Ill. 9, 20, 73 N. E. 393 (1905); aff'd, 201 U. S. 506, 520, 524 (1906); People *v.* Canal Appraisers, 33 N. Y. 461 (1865).

Drainage and land-reclamation are matters of state control, and state laws and grants of authority therefor are valid. Leovy *v.* United States, 177 U. S. 621 (1900); Soliah *v.* Heskin, 222 U. S. 522 (1912); Wurts *v.* Hoagland, 114 U. S. 606 (1885).

So the construction of bridges as parts of highways is primarily a state function.

the right of navigation,[38] and the public right of the state therein is incapable of alienation.[39] Where the title of the riparian owner extends to the middle thread of the stream, he holds title to the portion of the bed within that thread charged with the same public use in navigation — which at common law he could not defeat or unreasonably impair,[40] and which under acts of Con-

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And the same rule applies to dams: United States *v.* Rio Grande Dam, etc. Co., 174 U. S. 690 (1899); Elgin Hydraulic Co. *v.* City of Elgin, 194 Ill. 476, 62 N. E. 929 (1902); and to booms: United States *v.* Beef Slough, etc. Co., 8 Biss. (U. S.) 421 (1879); United States *v.* Duluth, 25 Fed. Cas. no. 15,001 (1871); Pound *v.* Turck, 95 U. S. 459 (1877); Heerman *v.* Beef Slough Mfg. Co., 1 Fed. 145 (1880); United States *v.* Bellingham Bay Boom Co., 176 U. S. 211 (1900).

And similar powers and limitations exist as to ferries: Conway *v.* Taylor, 1 Black (U. S.) 603 (1861) (1 FARNHAM, ch. II, § 12a); and harbors: Illinois *v.* Illinois Central R. R. Co., 33 Fed. 730 (1888), affirmed, 146 U. S. 387 (1892); Ohio River Transportation Co. *v.* Parkersburg, 107 U. S. 691 (1882).

The United States government has made no general grant of lands under navigable waters to individuals or classes of owners. Morris *v.* United States, 174 U. S. 196, 229 (1899); Shively *v.* Bowlby, 152 U. S. 1 (1894). And, without denying the jurisdiction and power of the state courts to determine this question of title, the United States Supreme Court has looked askance upon the extent to which the tide-water error has in some states been applied so as to extend the ownership of riparian owners to the bed of navigable streams. Barney *v.* Keokuk, 94 U. S. 324, 338 (1876).

As to the *corpus* of the water, *i. e.*, the particles of water forming a natural stream, the title of the riparian owner does not extend to them *in specie*, but to the flow of the water passing through or by his land. As the particles of water pass in succession over the lands of all the different owners and come to rest nowhere, the title to the particles of water does not vest in any of the riparian owners (2 BLACKSTONE, COMM. *18; United States *v.* Chandler-Dunbar Co., 229 U. S. 53, 69 (1913); Hudson R. R. Co. *v.* Loeb, 7 Robt. (N. Y.) 418 (1868)), but remains in the state for the benefit of all. Mitchell *v.* Warner, 5 Conn. 497 (1825); Brown *v.* Best, 1 Wils. 174 (1747); Sury *v.* Pigot, Popham, 166; Rhodes *v.* Whitehead, 27 Tex. 304 (1863); Fleming *v.* Davis, 37 Tex. 173 (1873).

[38] Kaukauna W. P. Co. *v.* Green Bay Co., 142 U. S. 254 (1891); Illinois Central R. R. Co. *v.* Illinois, 146 U. S. 387, 435, 452 (1892); Mobile Transportaton Co *v.* Mobile, 187 U. S. 479 (1903); United States *v.* Great Falls Mfg. Co., 112 U. S. 645 (1884); Great Falls Mfg. Co. *v.* Atty. Gen., 124 U. S. 581 (1888); Brookhaven *v.* Smith, 188 N. Y. 74, 80 N. E. 665 (1907); Niagara County I. & W. S. Co. *v.* College Heights L. Co., 111 App. Div. 770, 772, 98 N. Y. Supp. 4 (1906); Mayor *v.* Appold, 42 Md. 442 (1875).

[39] Ill. Central R. R. Co. *v.* Illinois, 146 U. S. 387, 453 (1892); West Ch. St. R. R. Co. *v.* People, 214 Ill. 9, 73 N. E. 393 (1905), 201 U. S. 506 (1906) (tunnel under Chicago River).

[40] United States *v.* Chandler-Dunbar Co., 229 U. S. 53 (1912); HALE, DE PORTIBUS, 51; Avery *v.* Fox, 1 Abb. (U. S.) 246 (1868); Buffalo Pipe Line Co. *v.* N. Y., etc. R. R. Co., 10 Abb. N. C. (N. Y.) 107 (1880); Pollock *v.* Cleveland Shipbuilding Co., 56 Ohio St. 655, 47 N. E. 582 (1897); State *v.* Narrows Island Club, 100 N. C. 477, 5 S. E. 411 (1888); Doucette *v.* Little Falls Imp. & Nav. Co., 71 Minn. 206, 73 N. W. 847 (1898).

gress, as to the navigable waters of the United States, he cannot in any way impair without the express consent of the Government.[41]

Navigation does not necessarily involve title or ownership of the bed. Whether ownership of riparian lands extends to the middle thread, or stops with meander lines or with low-water lines, are local questions determined by state law, which is binding on the federal courts,[42] even to the latest decision changing the local rules.[43] And this applies to claims of title under federal grants, and to accretions and made land in national streams like the Mississippi.[44]

But questions of navigation, and of what are "navigable waters of the United States," are federal questions,[45] for the federal jurisdiction over interstate commerce carries as an incident control over waters which may be used therefor. The right of navigation and the power of Congress to regulate it are unaffected by the question whether the bed over which the stream flows is owned by nation, state, municipality, or riparian owner.[46] In any case, navigation is subject to regulation by governmental authority. If it is subjected to conflicting regulations, those which are local give way to those which are national.

Like all other rights, the right of navigation is subject to the police power, which is exercised primarily by the states; and reasonable state and municipal regulation of navigation, such as

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[41] Philadelphia Co. *v.* Stimson, 223 U. S. 605 (1912); West Chicago St. Ry. Co. *v.* Chicago, 201 U. S. 506, 520 (1906); Lewis Oyster Co. *v.* Briggs, 198 N. Y. 287, 91 N. E. 846 (1910); aff'd, 229 U. S. 82 (1913).

[42] St. Louis *v.* Rutz, 138 U. S. 226, 242 (1891); Shively *v.* Bowlby, 152 U. S. 1 (1894); Packer *v.* Bird, 137 U. S. 661 (1891); Rundle *v.* Delaware & R. Canal Co., 14 How. (U. S.) 80 (1852); St. Anthony Falls Water Power Co *v.* St. Paul Water Commrs., 168 U. S. 349–358 (1897); Hardin *v.* Jordan, 140 U. S. 371 (1891); Jones *v.* Soulard, 24 How. (U. S.) 41 (1860).

[43] Mobile Transp. Co. *v.* Mobile, 187 U. S. 479 (1903).

[44] Archer *v.* Greenville Gravel Co., 233 U. S. 60 (1913); Barney *v.* Keokuk, 94 U. S. 324 (1876). And so of the property in an island in a navigable river which at times is submerged and later reappears, Widdicombe *v.* Rosemiller, 118 Fed. 295 (1902); and so of an unsurveyed island, United States *v.* Chandler-Dunbar Co., 209 U. S. 447 (1908).

[45] Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1 (1824); Passenger Cases, 7 How. (U. S.) 283 (1849); Wisconsin *v.* Duluth, 96 U. S. 379 (1877); United States *v.* Rio Grande, etc. Co., 174 U. S. 690, 708 (1899); Philadelphia Co. *v.* Stimson, 223 U. S. 605, 634–635 (1912).

[46] Scranton *v.* Wheeler, 57 Fed. 803 (1893).

making harbor lines, authorizing bridges, requiring signals, and enforcing pilotage regulations, are valid[47] until superseded by federal regulations.[48] The Congressional control of navigable streams does not exclude the power of the states to authorize the construction and maintenance of improvements which do not interfere either with navigation or with the improvements or control of the Federal Government.[49] So a state can construct a canal through dry land, or canalize a non-navigable stream, or improve a navigable stream, or, as in the case of the Erie Canal, construct one canal which combines all of these features. But if such canal should connect with navigable waters of the United States, it thereby becomes itself a navigable water of the United States.[50] So, a state canal which, by connecting with a railway, is a link in a through line of interstate commerce, is subject to federal regulation. The Interstate Commerce Act[51] authorizes the Interstate Commerce Commission to establish such through routes, and adds, "Any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water." [52]

Concurrent improvements of the same stream may be made by the two governments or by one government, the other contributing to the cost. In the early days the Federal Government often contributed money or land grants to aid in meeting the cost of canals built or authorized by some one of the states. Thus it contributed money to the construction of the Louisville Canal around the falls in the Ohio, and made a land grant to help Illinois build the Illinois and Michigan Canal, which, as finally constructed, extended from Lake Michigan at Chicago one hundred miles west to La Salle, Illinois, at the head of steamboat navigation on the Illinois River. Still later, when the State by its agency, the Sanitary District of Chicago, built the great Sanitary and Ship Canal

[47] *Ex parte* McNiel, 13 Wall. (U. S.) 236 (1871); Escanaba Co. *v.* Chicago, 107 U. S. 678 (1882).

[48] Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1 (1824); Spraigue *v.* Thompson, 118 U. S. 90 (1886), reversing 69 Ga. 409 (1882).

[49] Withers *v.* Buckley, 20 How. (U. S.) 84 (1857).

[50] Huse *v.* Glover, 15 Fed. 292 (1883), 119 U. S. 543 (1886); Sands *v.* Manistee River Improvement Co., 123 U. S. 288 (1887).

[51] Sec. 15, 24 STAT. AT L. 384, as amended by 34 STAT. AT L. 589, 36 STAT. AT L. 552.

[52] 4 FED. STAT. ANN., 2 ed., p. 469.

extending thirty-one miles between Lake Michigan and the Des Plaines River and costing more than $50,000,000, the Federal Government contributed by consenting that the waters of Lake Michigan be turned into it through the Chicago River, upon the improvement of which the Federal Government had expended about $15,000,000. The city also had expended large sums on the Chicago River.[53]

This close co-operation between the states and the Federal Government emphasizes the anomalous legal situation, wherein the state and federal courts are competent to take opposite views concerning the navigability of a given stream, which both governments may have joined in improving. The reason for the attitude of some of the state courts is to be found primarily in their adjudications of title. Title to submerged land is, as we have seen, solely determined by state law. Decisions upon such titles frequently pass unnecessarily upon navigability. This was so in the first group of Illinois cases cited above[54] and in *Palmer* v. *Mulligan*,[55] wherein Chancellor Kent mingled in his decision and in effect confused questions as to the title of nontidal stream beds with those concerning the navigability of those streams. The

[53] 20 OPINIONS ATTY. GEN. 101 (1891); Tempel *v.* United States, 248 U. S. 121 (1918).

In 1908 Illinois adopted an amendment to her constitution, authorizing the legislature to provide for the construction of a deep waterway from Lockport on the Des Plaines and Sanitary and Ship Canal (which merge at that point) to Utica on the Illinois River 70 miles west, and to issue $20,000,000 of state bonds to provide funds for the cost (ILL. L. 1907–8, p. 102).

The necessary legislation was enacted (ILL. L. 1915, pp. 18–35, and ILL. L. 1919, pp. 977–990); Congress enacted co-operative legislation (36 STAT. AT L., part. 1, pp. 659–661), and the improvement of the Des Plaines is in progress.

[54] See note 3, *supra*.

[55] 3 Caines (N. Y.), 307 (1805). By the common law, the title to lands bounded upon non-tidal streams extended to the middle thread (HALE, DE JURE MARIS, c. 1), and by a body of decisions following Chancellor Kent's judgment in Palmer *v.* Mulligan, *supra*, such streams were also held non-navigable; and the result has been a tendency to confuse the one subject, land-title, with the other, navigation.

Mr. Farnham, in his chapter III, has assembled the decisions showing that in formulating this tide-water test, in that case, Chancellor Kent committed one of his very few errors: that the question was one of title and not one of navigation. That case was decided in 1805, and Kent repeated the rule in his lectures, first published as Commentaries in 1826. It was adopted by Mr. Angell in his work on WATER COURSES (first published in 1824), in which he endeavored to make a distinction between navigable streams and boatable streams.

courts have conceived themselves bound by these prior cases which seemed, from their language, to have settled that certain streams were unnavigable.

In the contest between the riparian owner who wishes to dam and the navigator who wishes a free channel, the court which emphasizes riparian rights tends unconsciously to interpret facts, weigh evidence, and resolve incidental questions, all favorably to the riparian right; and *vice versa*.

So in the *Des Plaines River Cases* the Illinois court, adopting the view of experts for the defense, emphasized the admitted difficulties of navigation, especially two shallows occupying less than two miles in length, the lack of water for half the year, and the absence of navigation for nearly a century, and decided that the Des Plaines had never been navigated at all, by the fur trade or any other use. The Federal Court of Appeals, on the other hand, emphasized the evidence that for one hundred ninety days out of the year gage readings proved that the Des Plaines had a navigable depth of from twelve to fifteen inches (excepting the two shallow spots), and that this is sufficient for navigability; that during forty-seven days of high water each year a boat drawing fifteen inches can pass from the Des Plaines to Lake Michigan without portage; that for a varying period between these extremes boats of deeper draft can navigate the Des Plaines; and that this was done for more than a century by the fur traders. The federal court enumerates fourteen recorded voyages. Of these, nine were in evidence before the state court but three only were considered to be "well authenticated voyages" of the Des Plaines,[56] by the state court, which also disregarded the evidence presented by a multitude of books of travel, geography, history, and reports of surveys by United States engineers, and reports by territorial governors and other public officers. The river had not been navigated commercially for three quarters of a century, and that was made de-

[56] In each of the cases exclusive proofs were introduced of use in the fur trade, consisting of documents, official reports by Indian agents, by the Governor of Illinois Territory, Gallatius Report on Means of Communication (1808), by United States Surveyor Hotchins (1778–1797), by Governor St. Clair (1790), by the Congressional Committee: H. R. 18th Congress, 2d Session, Vol. I, ser. no. 172 (1825), finding "uninterrupted navigation from the river into the lake"; and by reports of ten surveys by the United States Engineers. A discussion of this evidence and the legal questions involved would require a separate article.

cisive. The federal court found that the parallel canal first displaced the river and that a parallel railroad afterwards displaced the canal; just as did the Erie Canal and the New York Central Railway in the case of the Mohawk River. But it decided that though the river was thus long disused, the public right inhered.[57] In brief, each court decided the incidental questions in accordance with its tendency on the main question.[58]

These conflicting standards of navigability recall the period when railroads in different states were built of different widths. They prevent the development of commerce. A uniform standard is necessary, and this can be most certainly obtained by action of the Federal Government, establishing the federal standard. All the navigable streams of the country have now been declared by Congress to be navigable waters of the United States. But if the courts of different states may determine in conflicting judgments, some that the Mississippi is and some that it is not navigable, each according to some standard of its own, and those judgments are respected as final and not reviewable by the Supreme Court of the United States, the confusion will continue. The question of navigability, at least for the purpose of determining what are "navigable waters of the United States," should not be left to final determination by local or state courts. This development of the law is much needed but not yet accomplished, as the first of the *Des Plaines River Cases* shows. There the Supreme Court of the United States[59] accepted as final and unreviewable the decision of the state court that the Des Plaines was not a navigable stream, as amounting to a conclusive determination of the question, "Was it a navigable water of the United States?"

But the United States was not a party to the suit of the State; the evidence in the Government's case was much fuller than that in the State's case; and in the Government's case the decision of the

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[57] See People *v.* Page, 39 App. Div. 110, 115, 56 N. Y. Supp. 834 (1899).

[58] The tendency of the state court is exemplified in Illinois *v.* New, 280 Ill. 393, 400, 117 N.E. 597 (1917) (concerning Thompson Lake, a tributary of the Illinois River), where a depth of three feet in a state of nature seems required to meet the court's idea of navigability; and the fact that the discharge of the Ship Canal has added between three and four feet to depth, is disregarded, and the question determined by the condition existing before the alteration.

[59] 234 U. S. 497 (1914).

State's case is held not to make the matter *res judicata*, and not to be persuasive against the new finding of navigability.

III. The Source of National Authority, and the Cautious and Gradual Exercise of Control

The grant of power to Congress to regulate commerce [60] is the source of its authority to regulate navigation and navigable waters. The Ordinance of 1787 had already ordained that

"the following . . . shall be considered as articles of compact between the original States, and the People and States in the said territory [northwest of the Ohio], and forever remain unalterable, unless by common consent, to wit; . . . The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States," etc.[61]

By Act of August 7, 1789, the first Congress continued this ordinance in effect.[62]

The final decision in the *Des Plaines River Cases* is notable for its holding that this provision of the Ordinance is still in force, "being analogous in this respect to legislation enacted under the exclusive power of Congress to regulate commerce with the Indian tribes." [63]

By Act of May 18, 1796,[64] Congress enacted that "all navigable rivers, within the territory to be disposed of by virtue of this act, shall be deemed to be, and remain public highways." This was generalized and made part of the Revised Statutes of the United States.[65]

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[60] United States Const., Art. I, § 8, cl. 3.

[61] U. S. Rev. Stat., 2 ed., 15–16, § 14.

[62] 1 Stat. at L. 50–53.

[63] Per Pitney, J., 41 Sup. Ct. Rep. 409, 412 (1921). An analysis of the conflicting decisions on the Ordinance, or on its navigation clause alone, would require a separate article.

[64] 1 Stat. at L. 468, § 9.

[65] U. S. Rev. Stat., § 2476. This provision as to navigable rivers is repeated in the Act of March 3, 1803, for disposal of the lands of the United States south of the State of Tennessee, 2 Stat. at L., ch. 27, pp. 229, 235, § 17, and by the Act of March 26, 1804, for the disposal of the public lands in the Indiana Territory, 2 Stat. at L., ch. 35, p. 279, § 6, and in several of the Acts for admitting states to the Union. Act of March 2, 1819, for the admission of Alabama, 3 Stat. at L., ch. 47, § 6, p. 492, interpreted in Pollard *v.* Hagan, 3 How. (U. S.) 212 (1845); Act of Feb. 14, 1859, for

Among the earlier federal cases there is a marked tendency to avoid an exercise of jurisdiction which would interfere with the authority of the state. Chief Justice Marshall set the example in *Wilson* v. *Blackbird Creek Marsh Co.*[66] A Delaware statute authorized a dam across a little-used but actually navigable tidal stream. The dam, by reclaiming marsh land, increased the value of the riparian property, and was said to improve the health of the community. A sloop seeking to navigate this creek injured the dam, and its owner was held liable by the state court. The federal court refused to disturb the judgment, on the ground that since the whole subject matter was within the domain of Congress, it alone had the power to object to obstructions which a state authorized. While Congress did not act, the state might validly act, and obstructions authorized by it would not be interfered with by the federal courts.

In 1851, in *State of Pennsylvania* v. *Wheeling Bridge Company*,[67] the court held that Congress had acted

"by licensing vessels, establishing ports of entry [along the Ohio River], and imposing duties upon masters and other officers of boats; . . . and they [Congress] have expressly sanctioned the compact made by Virginia with Kentucky at the time of its admission into the Union [that the] use and navigation of the River Ohio . . . shall be free and common to the citizens of the United States . . . This compact, by the sanction of Congress, has become a law of the Union. What further legislation can be desired for judicial action?"[68]

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admission of Oregon, 11 STAT. AT L., ch. 33, p. 383, interpreted in Willamette Iron Bridge Co. *v.* Hatch, 19 Fed. 347 (1884), 125 U. S. 1 (1887).

[66] 2 Pet. (U. S.) 245 (1829). [67] 13 How. (U. S.) 518, 565, 566 (1851).

[68] Congressional action was shown by appropriations by twelve acts of Congress for improving the Ohio (4 STAT. AT L. 32), by the government ownership of shares in the Louisville and Portland Canal Co., which built a canal around the falls of the Ohio (4 STAT. AT L. 162, 353), and by surveys of the river by the national government in 1843 and 1845. (See U. S. ENGINEERS REPORTS for 1882, pp. 1881–1887, Part II.) McLean, J., referred to these in bulk, saying: "Appropriations by Congress have been frequently made, to remove obstructions to navigation from its channel" 13 How. (U. S.) 518, 561 (1851).

After the bridge was decided to be unlawful, Congress passed an act authorizing the bridge; and it was decided that although the bridge did impede navigation, it was a valid exercise of congressional power, which included "the power to determine what shall or shall not be deemed, in the judgment of law, an obstruction of navigation" 18 How. (U. S.) 421 (1855). This has been followed ever since. The Clinton Bridge, 10 Wall. (U. S.) 454 (1870).

Gradually Congress exercised its power. First came harbor bills, then river and harbor appropriations. Interspersed with these were special acts, and sections buried in the heart of appropriation acts,[69] authorizing particular works, and a great variety of more or less public enterprises. Then came the slow realization that definite and uniform rules and standards should be applied, and general legislation followed.

In recent years Congress has passed several acts evincing a growing tendency to protect the navigable waters of the United States. The following are of especial interest:

Act of 1880; for the removal of obstructions, such as sunken craft, at the expense (1) of the owners thereof, or (2) of the United States;[70]

Act of 1884; for the construction of aids to navigation at points of bridge construction, as specified by the Secretary of War;[71]

Act of 1888; for the alteration of bridges as specified by the Secretary of War, so as to render navigation "free, easy and unobstructed," and for the insertion of fish-ways in dams;[72]

Act of 1890; requiring permission by the Secretary of War for building structures in, or altering channels of, navigable waters, and making it unlawful thereafter to commence such constructions under any act of state legislation until the location and plan of same shall have been approved by him (with exception for bridges theretofore duly authorized by law);[73]

Act of 1892; extending the prohibition of the Act of 1890 against alterations of channels, so as to apply to ports, harbors, etc.[74]

And by the important Act of 1899 it was provided[75] that

"It shall not be lawful to construct or commence the construction of any bridge, dam, dike or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other *navigable water of the United States* until the consent of Congress . . . shall have been obtained, . . .

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[69] Such, for example, as sections 6 and 7 of the General Post-office Appropriation Act of 1852, legalizing the Wheeling Bridge; Act of August 31, 1852, §§ 6, 7; 10 STAT. AT L. 112, quoted in 18 How. (U. S.) 421, 426 (1855).

[70] 21 STAT. AT L. 197, § 4 (June 14, 1880).

[71] 23 STAT. AT L. 148, § 8 (July 5, 1884).

[72] 25 STAT. AT L. 424–425, §§ 9–12 (Aug. 17, 1888).

[73] 26 STAT. AT L. 454, § 7 (Sept. 19, 1890).

[74] 27 STAT. AT L. 110, § 7 (July 13, 1892).

[75] 30 STAT. AT L. 1151, § 9 (March 3, 1899).

until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further*, That when plans for any bridge or other structure have been approved . . . it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War."

The next section [76] sweepingly prohibits any obstruction "to the *navigable capacity* of any of the *waters of the United States*" not affirmatively authorized by Congress, or any alteration of a channel unless recommended by the Chief of Engineers and authorized by the Secretary of War before the work is begun. This, it was decided, in *United States* v. *Rio Grande Irrigation Company* [77] protects a stream from any interference which would diminish the capacity of the navigable portions, though that interference be by irrigation works authorized by the state in the non-navigable portions of the stream several hundred miles from the navigable part. The New Mexico court had held that since the navigable portion within the territory was relatively short and far removed from the improvements, and since the interests of navigation involved were relatively small while those of agriculture, to be promoted by irrigation, were large, the improvements were lawful even though they did diminish the volume of the stream. The Supreme Court of the United States held that these were questions exclusively for Congress, saying:[78]

"Evidently Congress, perceiving that the time had come when the growing interests of commerce required that the navigable waters of the United States should be subjected to the direct control of the National Government, and that nothing should be done by any State tending to destroy that navigability without the explicit assent of the National Government, enacted the statute in question."

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[76] 30 STAT. AT L. 1151, § 10.

[77] 174 U. S. 690 (1899), reversing 9 N. Mex. 292, 51 Pac. 674 (1898).

[78] *Ib.*, 174 U. S. 690, 708 (1899).

The Act of Congress of June 21, 1906,[79] entitled "An Act to regulate the construction of dams across navigable waters," still more explicitly asserts the federal authority. It provides,

"that when, hereafter, authority is granted by Congress to any persons to construct and maintain a dam for water power . . . across any of the navigable waters of the United States, *such dams shall not be built or commenced* until the plans and specifications for its construction, . . . and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of War and Chief of Engineers for their approval, or until they shall have approved such plans and specifications and the location of such dam and accessory works," etc.

Many previous decisions were rendered inapplicable by these provisions.

The Acts of 1899 and 1906 were drafted by Hon. Theodore E. Burton of Ohio, long the efficient chairman of the River and Harbor Committee of the House, and an eminent lawyer. They were early expressions of the movement for conservation of natural resources which later received fuller expression in the measures for flood control, improvement of navigation, and water-power regulation.

But the Act of 1899 does not entirely supersede state authority. Where the navigable portion lies wholly in one state, concurrent assent of the state legislature is provided for; and the permit of the Secretary of War alone is not sufficient to authorize the licensee to disregard the laws of the state or ordinances of its municipality.[80] This makes the consent of the state legislature a federal prerequisite, and in effect appoints the state legislature a federal agency to assist in protecting the interests of the nation.

IV. Remedies of a State for Breaches of Federal Laws

A peculiar interest attaches to the question of a state's remedy for breaches of federal laws, because of the concurrent jurisdiction granted to enforce prohibition by Section 2 of the Eighteenth

[79] 34 STAT. AT L. 386.

[80] Cummings *v.* Chicago, 188 U. S. 410 (1903); Montgomery *v.* Portland, 190 U. S. 89 (1903); Cobb *v.* Lincoln Park, 202 Ill. 427, 67 N. E. 5 (1903); Minnesota Canal & Power Co. *v.* Pratt, 101 Minn. 197, 112 N. W. 395 (1907); Hubbard *v.* Fort, 188 Fed. 987 (1911); Wilson *v.* Hudson Water Co., 76 N. J. Eq. 543, 76 Atl. 560 (1910).

Amendment and the many unsolved problems arising therefrom. A problem somewhat similar was raised in the *Des Plaines River Cases* by the suit of the State of Illinois.

The navigable portion of the Des Plaines is wholly in Illinois, and under Section 9 of the Act of Congress of 1899, if it was a navigable stream, the consent of the state legislature was necessary in order to dam it. The defendant began damming the stream with no permit from either government; whereupon the suit by the state and that by the United States were successively filed.

The Illinois courts found the Des Plaines River non-navigable in its natural condition, sustained the demurrer to the claim of artificial navigability, and dismissed the information. The State thereupon sued out a writ of error from the Federal Supreme Court and there insisted that its claim that the river was a navigable water of the United States such as to entitle the State to succeed in its suit, was not concluded by the finding and judgment of the State courts. The State further contended that on the question whether permanent alterations of the river and the addition of water from Lake Michigan made it navigable, there had been no finding of fact in the Illinois courts but a decree sustaining a demurrer upon a question of law. The Supreme Court dismissed the writ of error. One reason suggested by Chief Justice White, at the argument, was that the State was bound by the decision of its own courts. But this contention is met by the decisions in *New Jersey* v. *Yard*,[81] and *Alabama* v. *Schmidt*,[82] to the effect that a state may assert a right in its own courts under federal laws, and may maintain a writ of error in the Supreme Court of the United States to review a judgment adverse to such claim. During the argument of the State's writ of error the court ascertained that the Federal Government was maintaining a distinct but similar suit against the same dam; and this may have had some influence in leading the court to avoid a determination on the merits in the State's case.

In its decision on the State's writ of error the Supreme Court held that "the State is not the instrument through which the jurisdiction can be exercised." [83] Underlying this seems to be the idea that the state and federal governments may each enforce its

[81] 95 U. S. 104 (1877).
[82] 232 U. S. 168 (1914).
[83] Illinois *v.* Economy Power Co., 234 U. S. 497, 524 (1914).

own laws in its own courts, and must confine itself to its own remedies in its own courts, or at any rate that a state must do so. But that method of dealing with the problem is not convincing. The United States rightfully can sue in the state courts, and upon occasion has maintained suit in the state courts and invoked state and local laws and remedies to protect its interests, and has been sustained in so doing, not because of any pre-eminence, but because it is a body politic and property owner and may rightfully exercise the same rights and pursue the same remedies as any other body politic or property owner.[84] So the acts of Congress are the law of the land, and except as otherwise provided are enforceable in the state courts and by the states.[85] And they are also laws of the United States, the enforcement of which involves federal questions, so that the denial of a right claimed under such acts presents a question for review in the Supreme Court of the United States.[86]

The Act of Congress of March 3, 1899, gives each state a special interest in streams whose navigable portions lie wholly in that state. This interest it holds as *parens patriae* for all its people.[87] In giving this special interest, Congress was giving effect to the principle of public policy which Chief Justice Marshall had formulated in the *Blackbird Creek* case. The state is made more than a federal agent. Its permit is a federal prerequisite to damming a water navigable wholly within its boundaries. It has power under the acts of Congress to give or withhold the permit, and to sue the wrongdoer who dams without a permit; and the existence or non-existence of the permit, and of the necessity for a permit, are federal questions.[88] And since the state has a power conferred by federal law and enforceable in a federal court, it may bring its suit there, as Pennsylvania did to enjoin the construction of the Wheeling Bridge before the Act was passed.[89] And as it can maintain a federal suit,

[84] Cotton *v.* United States, 11 How. (U. S.) 229 (1850); United States *v.* Graff, 67 Barb. (N. Y.) 304 (1875); United States *v.* Davy, Brayt. (Vt.) 146 (1820); United States *v.* Noyes, 4 Conn. 340 (1822); United States *v.* Smith, 7 La. Ann. 185 (1852).

[85] Second Employers' Liability Cases, 223 U. S. 1, 55–59 (1911).

[86] See U. S. REV. STAT., § 709; FED. JUDICIAL CODE, § 237; Defiance Water Co. *v.* Defiance, 191 U. S. 184 (1903).

[87] Kansas *v.* Colorado, 185 U. S. 125 (1902).

[88] United States *v.* Bellingham Bay Boom Co., 176 U. S. 211 (1900).

[89] State of Pennsylvania *v.* Wheeling Bridge Co., 13 How. (U. S.) 518 (1851).

so it would seem it should be allowed to maintain a writ of error in the Supreme Court of the United States to review the judgment of a state court which denies such claim under a federal law. Such a writ of error by a state was upheld in the two cases mentioned above.[90]

In the *Wheeling Bridge* case,[91] the standing of Pennsylvania to maintain its suit was upheld in part because of the investment by the state of some thirty millions of dollars in canals which connected directly or indirectly with the Ohio River. By the same token, Illinois should have succeeded in its *Des Plaines River* case, for through its public agency, the Sanitary District of Chicago, it had invested over $50,000,000, at the time of beginning suit, in the Sanitary and Ship Canal which connected directly with the Des Plaines River; it had directly expended $8,000,000 on the Illinois and Michigan Canal which connected with the Des Plaines; and its leading municipality had expended other large sums in improving the Chicago River, which was connected by both these canals with the Des Plaines River. And by Act of March 3, 1899 (the same Act which inaugurated the new policy), Congress itself appropriated $30,000 for a survey and estimate of the cost of improving the Upper Illinois and Lower Des Plaines; [92] this was repeated [93] by Act of June 6, 1900; and by Act of June 13, 1902, $200,000 more was appropriated for the same purpose.[94] By Act of June 25, 1910, $1,000,000 was appropriated for improvement of the Des Plaines,[95] subject to provisions for state co-operation. No valid distinction as to interest or investment seems practicable between the *Des Plaines River* case and the *Wheeling Bridge* case.

In *Missouri* v. *Illinois and Sanitary District of Chicago*,[96] the court recognized the right of a state to act for all its citizens in seeking to prevent the pollution of a navigable water of the United States. In that case the State of Missouri filed a bill alleging that Illinois and its public corporation, the Sanitary District, "acting as a governmental agency of said State," had constructed a channel connecting Lake Michigan and the Chicago River with the Des Plaines, and so indirectly the Illinois and Mississippi Rivers, and

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[90] See notes 81 and 82, *supra*.
[91] See note 89, *supra*.
[92] 30 STAT. AT L. 1146.
[93] 31 STAT. AT L. 580.
[94] 32 STAT. AT L. 364.
[95] 36 STAT. AT L. 659.
[96] 180 U. S. 208 (1901).

was about to discharge sewage greatly diluted with water of Lake Michigan, through this channel and these rivers into the Mississippi, to the injury to the health and commercial prosperity of the citizens of Missouri. Illinois and the Sanitary District demurred for want of jurisdiction. The court, speaking by Mr. Justice Shiras, said,[97] "But it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them." And later in a final hearing upon the merits, the same court, speaking by Mr. Justice Holmes, said,[98] "It is decided that a case such as is made by the bill may be a ground of relief"; — but a review of the evidence led to the decision that the bill was not proved, and ought to be dismissed without prejudice.

In *Georgia* v. *Tennessee Copper Co.*,[99] as well as in the cases by Missouri, Kansas, and Pennsylvania,[100] the court recognized the standing of the state to claim a federal remedy, and the jurisdiction of the court to provide it. The Act of 1899, which gave the state additional recognition, can hardly have taken that standing away.

Those suits were originally brought in the Supreme Court and hence there was no court below and no finding below. But in the *Des Plaines River* case, although there was a finding by the state court, that according to its standards the river was not a "navigable stream," still there was no finding of fact by the state court upon the other question, "Is it a navigable water of the United States?" The State, by its governor and attorney general, pursuant to the statute of the State, averred in its suit that Congress by the Acts of 1899, 1900, 1902, and 1910, the last of which appropriated $1,000,000 for the improvement of the Des Plaines, had said in effect, "the Des Plaines is a navigable water of the United States," and that this inured to the benefit of the State. The state court, it contended, might find or decide that the Des Plaines was not a "navigable stream," but Congress had effectually impressed upon it the character of a "navigable water of the United States."

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[97] 180 U. S. 241.

[98] 200 U. S. 496, 520 (1906).

[99] 206 U. S. 230 (1907).

[100] See respectively notes 96, 98, 87, and 89, *supra*.

"Navigable stream" (by Illinois standard, judicial or other), and "navigable water of the United States," are not identical terms. The latter is the creation of Congress; and the final determination whether a stream for the improvement of which Congress has appropriated money is or is not navigable water of the United States must, *ex necessitate*, when denied by the state court, rest with the federal courts, which in turn will be guided by the action of Congress. These Acts of Congress having affixed this character upon the stream, and its navigable portion being wholly in Illinois, section 9 of the Act of 1899 gave the State a special right arising under the laws of the United States, upon which it should have been entitled either to maintain original suit in the Supreme Court of the United States, or — since it had sued under an act of Congress in the state court — to bring up for review in the United States Supreme Court the denial of the right it claimed. And on the claim by the state of the right under federal law to have the stream adjudged a navigable water of the United States by reason of these improvements of the navigability of the river by the concurrent action of the two governments, there had been no finding of fact, but only a decree sustaining a demurrer thereto.

The dismissal of the state's writ of error was rendered innocuous as to this particular stream by the subsequent decree enjoining the same dam in the suit by the Federal Government itself.[101]

V. Relation of Federal and State Decisions on Same *Res*

The supremacy of the federal judgment in matters within federal jurisdiction has been recognized from the beginning. Though an act of Congress may give exclusive jurisdiction to the federal courts for the enforcement of a federal right, state courts may in the absence of such provision exercise jurisdiction.

Although in the two *Des Plaines River Cases* diametrically opposite decisions were rendered as to the natural navigability, in actual fact, of one and the same river, the Supreme Court of the United States following its rule not to review facts, left each decision undisturbed.

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[101] Economy Light & Power Co. *v.* United States, 256 Fed. 792 (1919), aff'd, 41 Sup. Ct. Rep. 409 (1921).

That rule, while seemingly held to be the result of statute,[102] has occasionally been departed from, and notably in *Leovy* v. *United States*.[103] There Leovy, the defendant below and plaintiff in error was a state official who, in pursuance of a resolution of the Police Jury directing such action, had in 1895 built a dam across Red Pass, which "is not a natural stream, but is in the nature of a crevasse, caused by the overflow of water from the Mississippi River." [104] "The crevasse seems to have been formed some time before the grant by the United States to Louisiana." [105]

The Circuit Court found Leovy guilty of violating the Act of Congress of 1890 by damming a navigable water of the United States, and imposed a fine, which judgment was affirmed by the United States Circuit Court of Appeals. The Supreme Court weighed the evidence and reversed this, saying:

"Our conclusion, upon the record now before us, is that Red Pass, in the condition it was at that time when this dam was built, *was not shown by adequate evidence* to have been a navigable water of the United States, actually used in interstate commerce, and that the court should have charged the jury, as requested, that, upon the whole evidence adduced, the defendants were entitled to a verdict of acquittal."

This was a weighing of the evidence.

In the *Montello* case,[106] the court twice held erroneous the decisions below that the Fox River in Wisconsin was non-navigable; and in order to reach that conclusion it not only weighed the evidence before the court, but went outside the record and exercised the power of an appellate court to take judicial notice of what the trial court should itself have known judicially.

VI. New Legislation — The Federal Water Power Act of 1920

The River and Harbor Appropriations Act [107] of 1917 provided for a Waterways Commission to formulate plans for developing water resources for navigation,

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[102] See Egan *v.* Hart, 188 U. S. 186 (1897).

[103] 177 U. S. 621 (1900).

[104] *Ib.*, 627.

[105] *Ib.*, 637.

[106] 11 Wall. (U. S.) 411 (1870), 20 Wall. (U. S.) 430 (1874).

[107] 40 Stat. at L., ch. 49, p. 269 (Aug. 8, 1917).

"including therein the related questions of irrigation, drainage, forestry, arid and swamp land reclamation, clarification of streams, regulation of flow, control of floods, utilization of water power, prevention of soil-erosion and waste, storage, and conservation of water for agricultural, industrial, municipal, and domestic uses, co-operation of railways and waterways, and promotion of terminal and transfer facilities, to secure the necessary data, and to formulate and report to Congress, as early as practicable, a comprehensive plan or plans for the development of waterways and the water resources of the United States for the purposes of navigation and for every useful purpose."

That section was repealed in 1920 by the Federal Water Power Act.[108] Section 18 was all-comprising in scope, but called mainly for plans to be reported and considered. The Act of 1920 was more limited in scope; but it formulates a plan and puts it in force. The pending proposal to deliver Muscle Shoals in the Tennessee River to private interests involves a repeal (so far) of the Act of 1920. Congress by the Act of 1920 created in lieu of the Waterways Commission "The Federal Power Commission," composed of the Secretary of War, the Secretary of the Interior, and the Secretary of Agriculture. By this Act Congress adopts a definite policy of licensing, regulating, and renting water powers in the navigable waters of the United States. The Act adopts President Roosevelt's view that the use of public property should be regulated and paid for, neither prohibited entirely nor given away. Congressional committees made divers reports as to the constitutional power of the national government to exercise such control of water powers.[109] The Act is too long to be abstracted here; and it bristles with new questions, the discussion of which would require a series of articles and which will inevitably involve much new litigation and many new decisions. It is sufficient for our purposes to notice that it lays down the statutory definition of navigable waters of the United States which was quoted at the outset of this article.

One effect of this definition is to establish the rules contended

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[108] 41 STAT. AT L., ch. 285, p. 1063 (June 10, 1920); FED. STAT. ANN. SUPP. of 1920, p. 367.

[109] See REP. SENATE COM. ON COMMERCE, Congressional Record, April 30, 1908, pp. 5664–5667, adverse to President Roosevelt's recommendation that water power be conserved and rented ("sold"); it remarks: "The Federal Government has nothing to 'sell.'"

for by both state and federal governments in the *Des Plaines River Cases*, (1) that a stream which has been artificially improved is to be judged thenceforward in its improved condition; (2) that parts of a stream where natural obstacles prevent navigation are nevertheless protected; (3) that streams for whose improvement Congress has made provision, or which have been recommended to Congress for improvement by the United States Engineers, are "navigable waters of the United States," whether deemed navigable streams by state courts or not.

The *Des Plaines River Cases* present another instance of conflict between federal and state judicial powers:[110] but more important, they take their place among the decisions establishing federal control of inland waters, which include *Gibbons* v. *Ogden*,[111] the *Genesee Chief*,[112] the *Passenger Cases*,[113] the case of the *Wheeling Bridge*[114]: and the cases of the *Daniel Ball*,[115] the *Montello*[116] and the *Lake Front* case[117]; and these may be considered together as judicially registering our progress in the conservation of the navigable waters of the United States.

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[110] Among many such, see these navigation cases: — Belden *v.* Chase, 150 U. S. 674 (1893), reversing S. C., 117 N. Y. 637 (1889) (action in State Court for negligently navigating yacht and so sinking steam-boat: defendant claimed to be navigating in obedience to Federal Statute and navigation rules); Harmon *v.* Chicago, 147 U. S. 396 (1893), reversing S. C., 140 Ill. 374, 29 N. E. 732 (1892). (The city collected from Harmon, owner of tugs, license fees for navigating tugs in Chicago River within city limits. He paid under protest and sued to recover same. Judgment for city in state court reversed, on the ground that the city had no power to impose such license tax.)

[111] 9 Wheat. (U. S.) 1 (1824).

[112] 12 How. (U. S.) 443 (1851).

[113] 7 How. (U. S.) 283, 286 (1849).

[114] 13 How. (U. S.) 518 (1851).

[115] 10 Wall. (U. S.) 557 (1870).

[116] 11 Wall. (U. S.) 411 (1870); 20 Wall. (U. S.) 430 (1874).

[117] Illinois Central R. R. Co. *v.* Illinois, 146 U. S. 387 (1892).